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No. 82-2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

E.J.T. CONSTRUCTION CO., INC., AND NATIONAL FIRE INSURANCE COMPANY OF HARTFORD AND AMERICAN CASUALTY COMPANY OF READING,
Petitioners

v.

UNITED STATES OF AMERICA FOR THE USE OF BILLOWS ELECTRIC SUPPLY COMPANY, INC.
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 4, 1982

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the lower court correctly determined that a direct contractual relationship existed between the General Contractor, E.J.T. and the Materialman, Billows, thereby permitting the Materialman to recover as a Miller Act claimant without providing 90 days notice, and obligating the General Contractor and sureties to the Materialman.

II. Whether the court below properly interpreted and applied the Miller Act language of "sums justly due" by permitting the Materialman to recover unpaid sums and service charges under the Miller Act from the General Contractor and sureties pursuant to the terms agreed upon in the contract between the Subcontractor and the Materialman, Billows.

DESIGNATION OF CORPORATE RELATIONSHIP

Billows Electric Supply Company, Inc., Respondent in this proceeding, filed this Brief in Opposition to Petition for Writ of Certiorari and states that:

1. This is the original designation of corporate relationships.

2. Billows Electric Supply Company, Inc. is not owned by any parent corporation.

3. Billows Electric Supply Company, Inc. does not have any ownership interest in any subsidiary.

4. Billows Electric Supply Company, Inc., does not have any affiliates.

August 4, 1982

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Billows Electric Supply Company, Inc., the Respondent herein, respectfully prays that the Petition for a writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix C of the Petition, and the Opinion of the United States District Court for the Eastern District of Pennsylvania is unreported and is printed in the Appendix of the Petition for Writ of Certiorari at Appendix A, page 1a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISIONS

The pertinent provision of the Miller Act is set forth in the Petition at pp. 2-3.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case and Summary of the Proceeding Below

Billows Electric Supply Company, Inc. (hereinafter "Billows"), a materialman on a United States of America contract, brought three separate Miller Act (40 U.S.C. §270b(a) et. seq.) actions against the General Contractor of the project, E.J.T. Construction Company, Inc. (hereinafter "E.J.T."), the Sureties on the project, National Fire Insurance Company of Hartford and American Casualty of Reading (hereinafter "the Sureties") and a subcontractor, B.D. Thomas Company (hereinafter "B.D. Thomas"), to recover monies owing to it for materials sold and delivered to the job site. The actions were consolidated prior to trial. Also prior to trial, B.D. Thomas settled with E.J.T.

On April 20 and 21, 1981, plaintiff's cases were tried to the Court, sitting without a jury, against the remaining defendants, E.J.T. and the Sureties (collectively known as the "Defendants").

The predominate issue presented at trial was whether Billows complied with the notice proviso of the Miller Act, or, in the alternative, whether it had a direct contractual relationship with the General Contractor, E.J.T., thereby rendering only the notice proviso of the Miller Act inapplicable. Contingent upon Billows suc-

cessfully establishing itself properly before the Court as a Miller Act claimant, the second issue presented was whether the Defendants were responsible for the one and one-half percent (1½%) per month service charge Billows imposed upon the unpaid balance for material sold and delivered.

The Court found that Billows did not satisfy the notice proviso of the Miller Act, but that it did have a direct contractual relationship with the General Contractor. The Court also held the Defendants responsible for the one and one-half percent (1½%) per month service charge Billows imposed upon the balance.

Thus, on July 9, 1981, the Court issued a Memorandum in Lieu of Findings of Fact and Conclusions of Law pursuant to Federal Rules of Civil Procedure 52(a) and in accordance with that Memorandum, on the same date, issued an Order entering a verdict and judgment in favor of Billows against the Defendants in the amount of Eighty-nine Thousand Two Hundred and Seventeen Dollars and Ninety-six Cents ($89,217.96). On July 20, 1981, Defendants filed a Motion for New Trial for Additional and Amended Findings and for Amended Judgment, which Motion was denied by the Court on August 12, 1981. Defendants appealed the Trial Court's determination to the United States Court of Appeals for the Third Circuit, which, after oral argument, affirmed. A Petition for Rehearing was presented to the United States Court of Appeals for the Third Circuit, and rehearing was denied. This matter has received unusual judicial scrutiny, in that it has had four separate reviews (twice in the District Court and twice in the United States Court of Appeals for the Third Circuit). Each Court has found in favor of Billows.

B. Counterstatement of Facts

A portion of the facts of this case was stipulated to during the course of the trial which stipulation was incorporated into the Trial Court's Memorandum. Those

facts established, *inter alia*, that Billows did in fact supply material for this project, that it was not reimbursed for some of the material supplied, that the Sureties executed a payment and performance bond to the United States of America in reference to the project, that the bonds were accepted by the United States of America, and that B.D. Thomas was hired by E.J.T. to be the electrical subcontractor on the project pursuant to a written agreement in the original amount of Six Hundred Thousand Five Hundred Dollars ($600,500.00).

Mr. Brian Thomas, the principal of Subcontractor B.D. Thomas, testified that the electrical subcontract required his company to supply certain kinds of electrical material for the job and that pursuant to that requirement, he contacted Billows, a supplier of electrical equipment with whom he had previously done business, to obtain oral price quotations, and subsequently, ordered and received delivery of various electrical equipment from Billows. The terms of payment for the electrical equipment were two percent (2%) discount if paid by the tenth of the month, net amount due within 30 days, and one and one-half percent (1½%) per month service charge on any unpaid balance due for more than 60 days.

B.D. Thomas made prompt payments to Billows and took advantage of the two percent (2%) discount for materials ordered and delivered until sometime in late 1976 when payments began to fall in arrears.

Commencing in late 1976 or early 1977, General Contractor E.J.T. began to experience difficulties with the electrical subcontract part of the project. These difficulties were caused by Billows' reluctance to continue to deliver materials to Subcontractor, B.D. Thomas, because of the large, outstanding balance he had with Billows.

Billows and E.J.T. spoke about the difficulties and decided that the best method for avoiding future delivery delays would be to institute a procedure pursuant to

which E.J.T. would issue monthly checks payable to Billows and Subcontractor, B.D. Thomas. Under that procedure, E.J.T. received copies of invoices from either B.D. Thomas or Billows on a monthly basis, and after verification, E.J.T. directed a joint check to B.D. Thomas for endorsement and transmittal to Billows.

Eventually, Billows informed B.D. Thomas that it could no longer accept further orders until the outstanding balance was paid. Billows also directly contacted E.J.T. to advise it of the difficulty it was experiencing in obtaining payment from B.D. Thomas and that Billows could no longer accept further orders from B.D. Thomas until the balance on the account was paid.

As a result of their communications, Billows and E.J.T. entered into an agreement providing for Billows to continue to ship the material to the job site in exchange for E.J.T. making payments against the old balance of the B.D. Thomas account and for making payments for new orders. The agreement between E.J.T. and Billows was first confirmed in a letter dated November 28, 1977 from E.J.T. to Billows. That agreement was modified, however, after further communications, which modified agreement was confirmed in a letter dated December 1, 1977, from Billows to E.J.T.

The written agreement, as modified in writing, provided that Billows would receive an initial payment of Twenty-nine Thousand Five Hundred Twenty-eight Dollars and Seventy-eight Cents ($29,528.78) from E.J.T., which payment was in fact received, that E.J.T. would make payments of Ten Thousand Dollars ($10,000.00) every 30 days against the old balance on the B.D. Thomas account and that all materials shipped subsequent to December 1, 1977, would be paid for within 30 days after delivery.

Pursuant to the agreement, Billows once again commenced shipment of materials to the job site for installation by B.D. Thomas but Billows received no further payments from E.J.T.

At trial, there was no dispute as to the delivery of the materials evidenced by the unpaid invoices nor to the amounts of the unpaid invoices and calculation of service charges. Disputed, however, was whether Billows properly sent Miller Act 90 day notice letters to E.J.T. and whether Billows and E.J.T. had entered into a direct contractual relationship thereby obviating the need to comply with the 90 day notice letter requirement.

Though Billows caused to be mailed to the Defendants, by registered mail, two separate Miller Act notice letters, one on December 8, 1977 and one on January 17, 1979, the Trial Court found that the timing of the letters failed to satisfy the statutory requirement that a notice letter be sent within 90 days of the last date material included within the original contract was delivered to the job site. The first notice letter was found to be sent prior to the last delivery of materials under the contract, and the second notice letter was found to be sent more than 90 days after the shipment of the last materials to be delivered under the original contract. The second letter was sent, however, within 90 days of the shipment of material which the Trial Court found to be repair or replacement items.

However, since the Court found a direct contractual relationship between Billows and E.J.T. it correctly concluded that the Miller Act was still applicable, and that Billows was entitled to recover the amount of the unpaid invoices plus service charges thereon.

ARGUMENT

I.

The Court Below Correctly Found As A Factual Matter Concordant With Prevailing Law, That A Direct Contractual Relationship Existed Between The Contractor, E.J.T. And The Materialman, Billows, Which Allowed Billows To Recover As A Miller Act Claimant.

The issue presented in this case is not of "sweeping significance". On the contrary, this case turns upon its own facts and will affect only the litigants. The issues raised at trial, on appeal, and again in the Petition for Certiorari, relate to purely factual questions which the lower court and U.S. Court of Appeals for the Third Circuit decided in conformance with the prevailing law.

The prevailing law holds that if a materialman enters into a direct contractual relationship with a general contractor, the materialman may recover from the general contractor the amount of invoices unpaid by the subcontractor as a Miller Act claimant, and without satisfying the 90 day provisio. *Continental Casualty Co. v. United States for Use and Benefit of Robertson Lumber Co.*, 305 F.2d 794 (8th Cir.) *cert. denied*, 371 U.S. 922 (1962) *United States, ex rel Greenwald-Supon, Inc. v. Gramery Contractors, Inc.*, 433 F.Supp. 156 (S.D.N.Y. 1977). The lower court determined that a direct contractual relationship existed between the general contractor, E.J.T. and the materialman, Billows. Accordingly, Billows was able to recover from the general contractor even if he failed to provide E.J.T. with 90 days notice.

The court below did not commit error when it found that a direct contractual relationship existed between E.J.T. and Billows. At trial, Respondent Billows introduced a great deal of evidence and testimony which supports the court's determination that a relationship existed.

The testimony of one of E.J.T.'s principals established that in 1976 Billows had its first communication with E.J.T., that E.J.T. received copies of invoices either from the sub-contractor or Billows on a monthly basis and that Billows had established communications with E.J.T. in order to commence a joint check procedure. The joint check procedure was established, but in 1977 Billows again had to speak directly to E.J.T. to advise it that the joint check procedure was not working, and of his decision not to supply material to the subcontractor until the account was paid. The discussions ultimately resulted in E.J.T. issuing a twenty-nine thousand, five hundred twenty-eight dollars and seventy-eight cent check ($29,528.78) to be applied to the subcontractor's balance (which included service charges to date), and correspondence was exchanged between Billows and E.J.T. to confirm their understandings. There are additional facts, which are amply set forth in the lower court's opinion found in the Petition's Appendix, at page 1a.

Based upon the above facts, the lower court determined that a contract existed between E.J.T. and Billows. Clearly this evidence was more than sufficient to support the lower court's holding. In the end, the lower court made a purely factual determination. No amount of strained semantics on petitioner's part can transform this case into anything other than a factual dispute. The court determined that a contractual relationship existed. That was the determinative issue, for once that conclusion was reached, Billows could recover under the Miller Act without providing 90 days notice. An issue such as the one resolved in this case does not warrant review by this Honorable Court.

II.

The Lower Court Properly Interpreted The Miller Act Language of "Sums Justly Due" By Finding As A Factual Matter That The General Contractor, E.J.T. Had Agreed To Be Bound By The Terms Of The Subcontractors Contract With The Materialman And, Therefore, Was Responsible For Contractually Imposed Service Charges.

Under the Miller Act, the claimant is entitled to all "sums justly due". 40 U.S.C. §207b(a). The phrase "sum or sums justly due" has been judicially defined to include service charges contractually imposed on past-due invoices. *Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc.*, 336 F.2d 445 (8th Cir. 1964), *cert. denied*, 379 U.S. 968 (1964); *D & L Construction Co. v. Triangle Electric Supply Co., Inc.*, 332 F.2d 1009 (8th Cir. 1964). The law further holds that the liability of the general contractor and sureties to a materialman under the Miller Act is governed by the contract between the subcontractor and materialman. *Id.* Moreover, in this case the lower court found, as a fact, that E.J.T. had agreed to be bound by the same contractual terms as the subcontractor.

The lower court found that "[e]ach bill of the Materialman to the subcontractor stated that a service charge of one and one-half percent per month would be imposed on any unpaid balance outstanding for more than sixty days." Appendix to Petition for Certiorari, at page 11a. The court then held the general contractor and sureties liable for the service charges.

The Miller Act provides two methods by which a materialman is entitled to recover from the general contractor: (i) by sending the general contractor a 90-day notice letter; or (ii) by having a direct contractual relationship with the general contractor. The reason for these two requirements is to allow the general contractor to withhold payments to the subcontractor in order to satisfy the claim asserted by the materialman. *United*

States, ex rel Greenwald-Supon, Inc. v. Gramery Contractors, Inc., 433 F.Supp. 156 (1977).

The fact that Billows was properly before the lower court under the direct contractual relationship aspect of the Miller Act, rather than under the 90-day notice aspect, should not affect the amount of Billows' recovery. Indeed, both the lower court and the Court of Appeals have agreed on this point. The 90-day proviso is merely an additional notice requirement, but it does not affect the scope of the financial coverage of the payment and performance bond. *United States v. H.R. Morgan, Inc.*, 554 F.2d 164 (5th Cir. 1977). Accordingly, the court below correctly concluded that Billows was entitled to service charges as part of its "sums justly due", just as it would have been if it were claiming under the 90-day notice provision.

The conclusion reached by the lower court does not involve any misinterpretation of the Miller Act, expansion of law, or conflicting decision. The court merely applied the law as formulated and enunciated by other Circuit Courts.

It is respectfully submitted that, in light of the careful judicial screening this case has withstood, its limited scope, and its correct application of prevailing law, this case is not one demanding review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays this Petition for Certiorari be denied.

RESPECTFULLY SUBMITTED,

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